

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

AERATORS ON PUBLIC FRESHWATER)	
LAKES, CROSS-REFERENCE TO RIPARIAN)	Administrative Cause
ZONES NONRULE POLICY DOCUMENT,)	Number: 09-147W
AND OTHER CHANGES ON PUBLIC)	(LSA Document #09-806(F))
FRESHWATER LAKES)	

**RULE PROCESSING, REPORT OF PUBLIC HEARINGS AND
RECOMMENDATION FOR FINAL ADOPTION**

1. RULE PROCESSING

For consideration are amendments proposed to 312 IAC 11-1 through 312 IAC 11-3 which assist with the implementation of IC 14-26-2 (sometimes referred to as the “Lakes Preservation Act”) in the management of “public freshwater lakes”. As proposed, the rule amendments would define and establish standards for a general license to place a qualified aerator. The rules would clarify an aerator that is not authorized by a general license would need to satisfy the requirements of an individual license. The amendments would amend the section regarding the administrative review of general licenses to include the general license established for the placement and maintenance of an aerator. The requirement for mediation would be removed where all parties to a dispute agreed not to mediate. A nonrule policy document that offers guidance for the determination riparian zones would be incorporated by reference. Other technical changes would be made.

The Natural Resources Commission gave preliminary adoption to the rule proposal during its meeting of September 22, 2009. As reported in the pertinent portions of the minutes:

Jim Hebenstreit, Assistant Director for the Division of Water, provided the Commission members with a revised draft of the proposed rule amendments copied on yellow paper. He said the rule was developed in cooperation with the Division of Law Enforcement, Division of Fish and Wildlife, and the Division of

Water. The amendments would establish general license standards for placement of aerators on public freshwater lakes. He said there has been a recent increase in applications from persons seeking to place aerators and in the placement of aerators without permits. The Division of Law Enforcement has a “major concern for placement of aerators during the winter months, because the aerator basically eliminates the ice and that poses a threat to snowmobilers, anglers, and others.”

Hebenstreit said a general license in the proposed rule would authorize the placement of an aerator from March through October. For other months, a person would need to apply with the Division of Water for an individual permit. The revised draft adds at 312 IAC 11-3-1.2(c)(3) a further clarification to limit the effects of an aerator to the user’s riparian zone. The revised draft also removes the proposed amendment at 312 IAC 11-3-1.2(c)(6), requiring the placement of the aerator “at least five (5) feet of clearance on both sides of the riparian line”. With this removal, the subdivisions are renumbered.

Hebenstreit said Maj. Felix Hensley, Indiana State Boating Law Administrator, was present to address questions regarding safety. He said Linnea Petercheff from the Division of Fish and Wildlife was present to address questions regarding impacts to fish and wildlife.

Michael Reed inquired whether the proposed rule would extend regulatory jurisdiction to reservoirs. “Why is the proposal limited to freshwater lakes?”

Hebenstreit responded that most public freshwater lakes are located in the northern third of the state. That was the location where the Department has perceived a problem.

Reed continued, “The issue doesn’t exist on the lakes to the south?”

Hebenstreit answered, “It hasn’t been brought to our attention. We may very well find out that there is an issue and have to come back to you.”

Reed said, “Clearly, I think it would” be also an issue on reservoirs.

Steve Lucas of the Commission’s Division of Hearings added that the statutory authority comes from Indiana Code 14-26-2 which governs “public freshwater lakes”. The proposal is an amendment to the rules administering public freshwater lakes.

Reed asked, “So, we have no jurisdiction on the reservoirs?”

Lucas responded that a reservoir could be a public freshwater lake. If a reservoir is not a public freshwater lake, the Commission might have jurisdiction through another statute governing public waters. A rule could be drafted to govern reservoirs that were constructed by the U.S. Army Corps and administered by the DNR or that impounded navigable waters.

Hebenstreit explained that the issue has not been observed on reservoirs, perhaps because with the larger reservoirs the lake levels are lowered during the winter.

“Part of the rationale for some of these aerators is to keep ice off a pier. At the lower winter pool on the big reservoirs, you don’t have the ice impact on piers.”

Reed asked, “Is the driver, though, safety for snowmobilers? What is driving the desire for this rulemaking?”

Ron McAhron stated, “This is another place where we’ve not had a clear rule laying out what you could and couldn’t do. We had an issue come up absent a rule. It started with a safety issue.”

Maj. Felix Hensley said the Division of Fish and Wildlife, the Division of Water, and the Division of Law Enforcement initiated review of the issue during the “winter before last. We actually had a snowmobile that went through thin ice that was generated by an aerator on Sylvan Lake. Even before that, however, we had safety concerns. Landowners may want to leave their piers in year round, and so they use an aerator on a timer, and some even vacation in other states. Consequently, what happens is an aerator will kick on, thin the ice maybe even to open water, and then the aerator goes off. A lot of times a very thin skim of ice will freeze over the top.” He said those using the lake for winter recreation may not be aware that an aerator was used in the area, or if a person is on the lake at night, the person may go into an area of thin ice created by an aerator and not see the problem. “Our goal was to come up with some idea where we could build in the safety factors where lake users were protected, riparian owners had their rights, and [the rule proposal] is a result of that.”

Reed said that he was “very familiar” with the issue. In his perspective, “The safety problem is not limited to the northern third of the state or freshwater lakes. Your argument on the pooling of the reservoirs, in my view, is not accurate.” Reed said he lives on a central Indiana reservoir, and “I can guarantee you that it doesn’t go down every year. If we are trying to protect the snowmobilers and skaters, which we should be doing, then we should expand or look at this thing to include all of the lakes, because if it is a safety issue, it’s a safety issue.”

Lucas said, “We can certainly do that, and we will take that as an instruction from the Commission. We will look at the use of aerators in the context of other waterways and report back to the Commission.” He added that the Commission’s ability to write rules is dependent upon a grant of statutory authority, however, and the Commission likely does not have authority to address aerators on all reservoirs. “I think it may present an interesting question whether the Commission has jurisdiction to do this on Geist Reservoir or Morse Reservoir.”

Reed said, “Fair enough.”

Jane Ann Stautz asked, “With regard to those that are required to get a license or a permit, what are the normal requirements or restrictions? Are there postings then that if they would request to have an aerator during the winter months, then are there postings required?”

Hebenstreit said there would be similar requirements that are listed in the proposed rule, such as signage, but so far the Division of Water has denied

applications based on safety concerns, and these are currently under administrative review.

Stautz said, “Speaking of no standards—that would be my other point with regard to the license or request for permits to place aerators. There should be clearly spelled out criteria as to whether you would approve or deny [an individual permit application] as well. We will continue to see more of these. If we go forward with this proposed rule, there will probably be more requests for those types of permits to have an aerator. I would want to make sure that there are clear criteria and how those are approved.”

Mary Ann Habeeb identified the need in 312 IAC 11-3-1.2(c)(6) for a technical clarification. The word “square” should be added to the proposed rule to indicate not more than 625 “square” feet of aquatic vegetation can be removed by the operation of an aerator.

Hebenstreit agreed with Habeeb’s recommendation. “The area is intended to be designated in square feet.”

The Chair said, “Obviously, the AOPA Committee and the administrative law judges need some clarity here. Good points were raised by members of the Commission.” He asked Lucas for suggestions as to Commission procedure.

Lucas responded the Commission could first give the proposed rule preliminary adoption with the technical amendment at 312 IAC 11-3-1.2(c)(6) as recommended by Mary Ann Habeeb. Doing so would allow the proposal to move forward for public freshwater lakes. Second, the Commission could offer a resolution to instruct the Department and Commission staff to “look at the feasibility of extending this proposition to public waters that are not public freshwater lakes.” Third, the Commission could offer a resolution asking the DNR and NRC to review the feasibility of drafting rules to set standards “applicable to the individual licensure of aerators, which would not qualify for a general license, as requested by the Vice Chair.”

Mary Ann Habeeb moved to give preliminary adoption to the proposed rule as presented by Jim Hebenstreit and with an amendment to 312 IAC 11-3-1.2(c)(6) adding the word “square” after the words “six hundred twenty-five (625)”. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

Stautz moved that the Department and Commission staffs be directed to review the applicability of the placement of aerators in public waters in addition to public freshwater lakes, as well as to develop criteria for the individual licensure of aerators in public freshwater lakes. Habeeb seconded the motion. Upon a voice vote, the motion carried.

A “notice of intent” to adopt the proposed rule amendments was published in the Indiana REGISTER on October 7, 2009 as LSA Document #09-806. The notice identified James J. Hebenstreit, P.E., Assistant Director of the DNR’s Division of Water, as the “small business regulatory coordinator”.

As specified by Executive Order, proposed fiscal analyses of the rule proposal were submitted to the Office of Management and Budget on October 8. In a May 3, 2010 letter, OMB approved the proposed fiscal analyses.

On May 6, 2010, the Division of Hearings submitted a copy of the proposed rule and corresponding “Economic Impact Statement” to the Legislative Services Agency. On May 10, LSA provided an intended date of posting of May 19, 2009. Also, on May 10, the Division of Hearings provided LSA with a “Notice of Public Hearing” (with a “Justification Statement”). Later on May 10, LSA issued to the Commission an “authorization to proceed” with the rule proposal.

In accordance with IC 4-22-2.1-5(c)(2), a copy of the proposed rule and the statement concerning rules affecting small business were submitted to the Indiana Economic Development Corporation on May 10, 2010. On June 9, 2010, IEDC submitted written comments to the Commission which stated in substantive parts:

Pursuant to IC 4-22-2-28, the Indiana Economic Development Corporation (“IEDC”) has reviewed the economic impact analysis for small business associated with rule changes contained in LSA Document 09-806 and proposed by the Indiana Natural Resources Commission (“NRC”). The proposed rule establishes a general license for the placement of qualified aerators in public freshwater lakes.

The economic impact statement prepared by the NRC indicates that the proposed rule will not impose any economic impact on small businesses.

The IEDC does not object to the economic impact on small businesses associated with the proposed rule. If you have any questions about the comments contained here please contact me at 232-8962 or raspberry@iedc.in.gov.

The Commission responded to the IEDC’s comments on the same day: “Thank you for your timely and thorough comments under IC 4-22-2-28. Since you have commented favorably upon the agency’s fiscal analysis, and have suggested no alternative, the Department of Natural Resources will recommend that the Natural Resource Commission move forward with consideration for final adoption of the language published for preliminary adoption.” IEDC’s full comments were made available for inspection and

copying in the Commission's Division of Hearings office and on the Commission's website on June 9, 2010. Copies of IEDC's comments were also available at the public hearing scheduled for June 18, 2010.

A public hearing on the rule proposal was scheduled for June 18, 2010 in the DNR's Northeast Regional Headquarters, 1353 South Governor's Drive, Columbia City, Indiana. The site was chosen because of its proximity to numerous public freshwater lakes. Notice of the public hearing and the text of the proposed amendments were posted in the Indiana REGISTER on May 19, 2010. This notice included the statement under IC 4-22-2.1-5 concerning rules affecting small businesses. The notice also included information required under IC 4-22-2-24. Notice of the public hearing with similar information was published on May 14, 2010 in the Indianapolis DAILY STAR, a newspaper of general circulation published in Marion County, Indiana and on the same day in the NORTHWEST INDIANA TIMES, a newspaper of general circulation published in Lake County, Indiana. On May 17, 2010, the notice with similar information was published in the NEWS SUN, a newspaper of general circulation in Noble County, Indiana. In addition, notice of the public hearings and a summary of the proposed rule changes were published on the calendar of the Commission's website.

2. REPORT OF PUBLIC HEARINGS AND COMMENTS

A. Report of Public Hearing

The public hearing was convened as scheduled in DNR's Northeast Regional Headquarters, 1353 South Governor's Drive, Columbia City, Indiana. Appearing as representatives of the Department of Natural Resources were James Hebenstreit, P.E., Assistant Director of the DNR's Division of Water, and Major Felix Hensley, Indiana State Boating Law Administrator. No member of the public appeared.

B. Comments by Email

The following comments were received by email:

Stephen L. Hinkle, Fort Wayne, IN (December 31, 2009)

I am writing regarding the rules for aerators of freshwater lakes in Indiana. It is unclear as to when this rule would take effect. In the current version of the rule it is unclear as to the period of time when a license would allow the use of an aerator. I have used an aerator to protect my pier and boat lift from the effects of ice in the winter during the months of December January and February and possibly March depending on the arrival of spring. The aerator I use melts the ice approximately 4 to 5 feet beyond my pier and boat lift. Generally speaking it isn't in a major traffic area for the snowmobilers or ice fishermen. Further, when the aerator runs it provides significant noise for people to know it's in operation. It is unclear at this time that the rule is in operation or not and I have been contacted by DNR officer and threatened with legal action. I have been unable to find an application on line to complete for an aerator on a freshwater lake. Doesn't there have to be a public hearing before this can become a part of Indiana law?¹

Shon R. Pulley Noblesville, IN (January 17, 2010)

I am opposed to the use of aerators to retard ice around the docks located on "public" waters in Indiana. The shore access to many of the lakes in Indiana is already limited due to development on the lakes. The result of the increased use of aerators will lead to larger docks that will not be removed at anytime of the year. This will result in even less shoreline access during the winter months for the public to use these waters.

Craig Ruble Johnson County, IN (January 23, 2010)

I am 100% opposed to aerators on public lakes due to the significant safety threat this poses for those wishing to be on the ice. It has been shown that an aerator can have a dramatic effect on the ice hundreds of feet away. No single property owner should have the right to ruin the ice for an entire lake. Furthermore, they should simply remove their docks in the winter rather than wasting the energy required to run an aerator.

Jon Eggen, Hendricks County, IN (June 18, 2010)

I do not believe that aerators should be allowed or permitted on public lakes. It is impossible to control the extent of thin and unsafe ice, especially when considering fluctuating temperatures and underwater currents. Aerators create large areas of unsafe ice which create life threatening situations and take large areas of the lake away from use by the public. The safety issue and the loss of public use are unacceptable because the aerators are not needed. Aerators are only being used to protect temporary structures

¹ Jennifer Kane responded to this email on behalf of the Commission's Division of Hearings: "Thank you for your comments regarding the proposed rule amendment to 312 IAC 11 governing the placement of aerators in public freshwater lakes.

You are correct that a public hearing is required during the rule adoption process. The proposed rule, LSA Document #09-806, is [on January 4, 2010] in the preliminary stage of rule adoption. The Commission has posted a 'checklist' on its Website, which provides an overview of the rule adoption process. The proposed rule is currently being reviewed by the Office of Management and Budget.... There are other administrative steps that must take place prior to a public hearing....

The proposed rule is not in effect; however there is a temporary rule that became effective December 1, 2009, which governs the placement of aerators in public freshwater lakes. See <http://www.in.gov/legislative/iac/20091125-IR-312090918ERA.xml.pdf>."

which are by definition “easily removable”. Allowing aerators makes these structures effectively permanent and allows for vast expansion in the size of these “temporary structures”. It is irresponsible for the state to allow this unsafe practice to occur when it is not necessary. If people do not want their piers damaged they should remove them.

C. Comments from the Lake Management Work Group

The Lake Management Work Group was established by the Indiana General Assembly in 1997 to receive citizen comments and to help develop solutions to problems faced by the State’s public freshwater lakes. Membership consists of four members of the Indiana General Assembly (bipartisan participation from the Senate and the House of Representatives), as well as agency professionals and citizen appointees. The Lake Management Work Group has been reauthorized periodically and was reauthorized during the most-recent session of the Indiana General Assembly through July 2011. SEA 1040.

In a letter dated June 15, 2010, **Indiana State Representative and Chair of the Lake Management Work Group, Nancy Dembowski**, wrote:

The Indiana Lake Management Work Group has reviewed the proposed rule on Aerators and other subjects.

We support the adoption of Section 1 related to the determination of riparian zones within LSA Document #09-806.

The Lake Management Work Group does not support the adoption of Sections 2 and 3. This proposed creation of a general license for aerators is not warranted because of the multiple safety and environmental issues that are involved. Each proposed aerator should be evaluated on its own merits and individually licensed.

3. RECOMMENDATION FOR FINAL ADOPTION

The proposed rules as published for preliminary adoption appear to be lawful and ripe for preliminary adoption. But the proposed rules include an important policy decision as to whether a general license should be authorized for the placement of qualified aerators. The Lake Management Work Group and most commentators oppose the establishment of the general license—favoring individual licensure or an outright prohibition of the permitting of aerators. If the Commission adopts the policy position of the Lake Management Work Group, SECTION 2 and SECTION 3 should not be given final adoption.

The Lake Management Work Group expressed support for approval of SECTION 1 to incorporate by reference a nonrule policy document that helps determine riparian boundaries. This provision has broader application than to the placement aerators and is very similar to a provision approved by the Commission for navigable waters in September 2009. The hearing officer recommends SECTION 1 for final adoption.

Neither the Lake Management Work Group nor individual citizens addressed directly SECTION 4. Some aspects of SECTION 4 would have importance only if the Commission determines to establish a general license for aerators. Two other aspects would apply to other contexts. One of these is an amendment to 312 IAC 11-3-2(c) and would remove the mandate for participation in mediation if none of the parties wishes to mediate. The other is an amendment to 312 IAC 11-3-2(d) and would make technical language adjustments, most notably adopting the statutory-defined phrase “shoreline or water line” from IC 14-26-2-4. The hearing officer recommends final adoption of these amendments to 2(c) and 2(d). The hearing officer does not recommend final adoption of the other aspects of SECTION 4 unless the Commission elects to establish a general license for aerators.

The hearing officer tenders alternatives for consideration as to final adoption:

If the Commission approves the entirety of language given preliminary adoption, including the establishment of a general license for qualified aerators, final adoption may be given to the language contained in Exhibit “A”. **OR**

If Commission approves final adoption of language exclusive of the provisions pertaining to aerators, final adoption may be given the language contained in Exhibit “B”.

To avoid the confusion that can arise from a summer amendment to rules implementing the Lakes Preservation Act, the hearing officer recommends deferral of the effective date of the amendments until January 1, 2011.

Dated: June 29, 2009

Stephen L. Lucas
Hearing Officer

Exhibit “A”

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule

LSA Document #09-806(F)

DIGEST

Adds 312 IAC 11-1-4, 312 IAC 11-2-1.5, and 312 IAC 11-3-1.2 and amends 312 IAC 11-3-2, governing public freshwater lakes, to define and establish standards for a general license to place an aerator, to clarify that an aerator that is not authorized by a general license must not be placed in a public freshwater lake except upon a person's prior receipt of an individual license, to amend provisions addressing the administrative review of general licenses to include general licenses for the placement and maintenance of an aerator, to remove the requirement of participation in mediation if all parties agree not to participate, to incorporate by reference a nonrule policy document that provides guidance for the identification of riparian zones, and to make other technical changes. Effective January 1, 2011.

312 IAC 11-1-4; 312 IAC 11-2-1.5; 312 IAC 11-3-1.2; 312 IAC 11-3-2

SECTION 1. 312 IAC 11-1-4 IS ADDED TO READ AS FOLLOWS:

312 IAC 11-1-4 Determination of riparian zones

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-8; IC 14-15; IC 14-26-2

Sec. 4. If a determination of riparian boundaries is reasonably required for the performance of functions under IC 14-26-2, this rule, and 312 IAC 11-2 through 312 IAC 11-5, the department (or the commission on administrative review) shall consider as guidance “Riparian Zones within Public Freshwater Lakes and Navigable Waters”, Information Bulletin #56 (Second Amendment) as published by the Legislative Services Agency at 20100331-IR-312100175NRA (March 31, 2010). (Natural Resources Commission; 312 IAC 11-1-4)

SECTION 2. 312 IAC 11-2-1.5 IS ADDED TO READ AS FOLLOWS:

312 IAC 11-2-1.5 “Aerator” defined

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-8; IC 14-15; IC 14-26-2

Sec. 1.5. “Aerator” means a mechanical device placed within a public freshwater lake that is used to accomplish any of the following:

- (1) Increase the amount of dissolved oxygen in the water.**
- (2) Increase the decomposition of organic materials.**
- (3) Alter water flow or circulation.**
- (4) Reduce icing.**
- (5) Enhance audio or visual enjoyment by bubbling or spraying water.**

(Natural Resources Commission; 312 IAC 11-2-1.5)

SECTION 3. 312 IAC 11-3-1.2 IS ADDED TO READ AS FOLLOWS:

312 IAC 11-3-1.2 General licenses for aerators

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23
Affected: IC 14-15; IC 14-26-2

Sec. 1.2. (a) This section establishes terms for a general license to place and maintain an aerator.

(b) A person who acts under this section is not required to complete an application or to obtain a written license from the department under IC 14-26-2 and this rule. A person who wishes to place or maintain an aerator, which does not qualify under this section, must obtain a written license in advance of placement.

(c) To qualify for the general license, a person must satisfy each of the following requirements:

- (1) Limit operation of the aerator to March through October.**
- (2) For March, post and maintain a sign at the site of the aerator that does each of the following:**

- (A) States “beware thin ice” in black lettering clearly visible to an approaching person.
- (B) Includes a standard illustration in black for thin ice, upon a reflective yellow background, within a black triangle.
- (C) Substantially conforms to the following illustration:



- (3) Limit the effects of the aerator to a distance that does not:
 - (A) exceed one hundred fifty (150) feet from the shoreline or water line of the public freshwater lake; or
 - (B) extend beyond the boundaries of the person’s riparian zone.
- (4) Operate the aerator to accomplish both of the following:
 - (A) Minimize the disturbance of bottom sediments.
 - (B) Not diminish water clarity.
- (5) Operate the aerator so it does not unduly infringe on the recreational usage of the lake by adjacent landowners or the public.
- (6) Operate the aerator so that it does not remove more than six hundred twenty-five (625) square feet of aquatic vegetation.
- (7) Cause the aerator to be the following:
 - (A) Readily inoperable or removable.
 - (B) Secure from movement caused by water currents, wind, or similar factors.

(Natural Resources Commission; 312 IAC 11-3-1.2)

SECTION 4. 312 IAC 11-3-2 IS AMENDED TO READ AS FOLLOWS:

312 IAC 11-3-2 Disputes regarding a structure placed under authority of a general license

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23

Affected: IC 4-21.5; IC 14-15; IC 14-26-2

Sec. 2. (a) A person may seek administrative review of the placement or maintenance of a ~~temporary structure or a dry hydrant, or a glacial stone reface~~, under section 1 **or 1.2** of this rule.

(b) Administrative review under this section is subject to IC 4-21.5 and 312 IAC 3-1. If a dispute involves the placement of a pier, another temporary structure, or a glacial stone reface, where the review of another structure authorized by a general license appears

appropriate to a full and fair determination of the dispute, the administrative law judge may order additional parties joined.

(c) The administrative law judge shall commit the matter to mediation under 312 IAC 11-1-3 as soon as practicable. Except as otherwise provided in this subsection, no administrative review brought under this section shall proceed to formal discovery or to a hearing without the completion of at least two (2) mediation sessions. A mediation session is not required to be scheduled where either:

(1) all parties agree **during a prehearing conference, during a status conference, or** in writing not to participate in mediation; or

(2) a party is dismissed or defaulted under 312 IAC 3-1-9(a), 312 IAC 3-1-9(b)(1), or 312 IAC 3-1-9(b)(2).

(d) Unless otherwise ordered by the administrative law judge or agreed in writing by all the parties, any structure placed by a party under section 1 of this rule must be removed from ~~within areas~~ along or lakeward of the ~~waterline or shoreline~~ **or water line** upon the later of the following:

(1) Ninety (90) days after filing of the request for administrative review.

(2) January 1 of the year following the filing of the request for administrative review.

(e) In exercising discretion under subsection (d), an administrative law judge shall consider whether the structure poses a substantial intrusion or merely a de minimis intrusion to the interests protected by IC 14-26-2, IC 14-15-7-3, and this rule.

(Natural Resources Commission; 312 IAC 11-3-2; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2224; filed Jan 23, 2001, 10:05 a.m.: 24 IR 1615; filed Jun 21, 2001, 3:03 p.m.: 24 IR 3374; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661)

Exhibit “B”

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule

LSA Document #09-806(F)

DIGEST

Adds 312 IAC 11-1-4 and amends 312 IAC 11-3-2, governing public freshwater lakes, to remove the requirement of participation in mediation if all parties agree not to participate, to incorporate by reference a nonrule policy document that provides guidance for the identification of riparian zones, and to make other technical changes. Effective January 1, 2011.

312 IAC 11-1-4; 312 IAC 11-2-1.5; 312 IAC 11-3-1.2; 312 IAC 11-3-2

SECTION 1. 312 IAC 11-1-4 IS ADDED TO READ AS FOLLOWS:

312 IAC 11-1-4 Determination of riparian zones

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23

Affected: IC 14-8; IC 14-15; IC 14-26-2

Sec. 4. If a determination of riparian boundaries is reasonably required for the performance of functions under IC 14-26-2, this rule, and 312 IAC 11-2 through 312 IAC 11-5, the department (or the commission on administrative review) shall consider as guidance “Riparian Zones within Public Freshwater Lakes and Navigable Waters”, Information Bulletin #56 (Second Amendment) as published by the Legislative Services Agency at 20100331-IR-312100175NRA (March 31, 2010). *(Natural Resources Commission; 312 IAC 11-1-4)*

SECTION 2. 312 IAC 11-3-2 IS AMENDED TO READ AS FOLLOWS:

312 IAC 11-3-2 Disputes regarding a structure placed under authority of a general license

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23

Affected: IC 4-21.5; IC 14-15; IC 14-26-2

Sec. 2. (a) A person may seek administrative review of the placement or maintenance of a ~~temporary structure or a dry hydrant, or a glacial stone reface,~~ under section 1 of this rule.

(b) Administrative review under this section is subject to IC 4-21.5 and 312 IAC 3-1. If a dispute involves the placement of a pier, another temporary structure, or a glacial stone reface, where the review of another structure authorized by a general license appears appropriate to a full and fair determination of the dispute, the administrative law judge may order additional parties joined.

(c) The administrative law judge shall commit the matter to mediation under 312 IAC 11-1-3 as soon as practicable. Except as otherwise provided in this subsection, no administrative review brought under this section shall proceed to formal discovery or to a hearing without the completion of at least two (2) mediation sessions. A mediation session is not required to be scheduled where either:

(1) all parties agree **during a prehearing conference, during a status conference, or** in writing not to participate in mediation; or

(2) a party is dismissed or defaulted under 312 IAC 3-1-9(a), 312 IAC 3-1-9(b)(1), or 312 IAC 3-1-9(b)(2).

(d) Unless otherwise ordered by the administrative law judge or agreed in writing by all the parties, any structure placed by a party under section 1 of this rule must be removed from ~~within areas~~ along or lakeward of the ~~waterline or shoreline~~ **or water line** upon the later of the following:

- (1) Ninety (90) days after filing of the request for administrative review.
- (2) January 1 of the year following the filing of the request for administrative review.

(e) In exercising discretion under subsection (d), an administrative law judge shall consider whether the structure poses a substantial intrusion or merely a de minimis intrusion to the interests protected by IC 14-26-2, IC 14-15-7-3, and this rule.

(Natural Resources Commission; 312 IAC 11-3-2; filed Feb 26, 1999, 5:49 p.m.: 22 IR 2224; filed Jan 23, 2001, 10:05 a.m.: 24 IR 1615; filed Jun 21, 2001, 3:03 p.m.: 24 IR 3374; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661)